185

(1)

Supreme Court, U.S.
FILED

No. 10-1319

APR 25 2011

OFFICE OF THE CLERK

In The

Supreme Court of the United States

MARTIN JAKUBOWSKI,

Petitioner,

vs.

THE CHRIST HOSPITAL, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

RICHARD C. HABER (0046788)
HABER POLK KABAT LLP
737 Bolivar Road, Suite 4400
Cleveland, Ohio 44115
Phone: (216) 241-0700
Fax: (216) 241-0739
E-mail: rhaber@haberpolk.com

Counsel of Record
Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Must a disabled Plaintiff present a "trial ready accommodation proposal" for his employer prior to his termination from employment in order to successfully prove that his employer unlawfully discriminated against him on the basis of his disability in violation of the Americans with Disabilities Act and Rehabilitation Act?

2. Does an employer discharge their obligations to engage in a good faith interactive process to identify a reasonable accommodation by offering to help the disabled individual find a position with another employer rather than accommodate the individual's disability themselves?

PARTIES

The parties to this proceeding are set forth, in part, in the caption. In addition to those parties identified in the caption, Dr. Philip Diller was named in his individual capacity under Ohio state law. He is not named in his individual capacity under either the Americans with Disabilities Act or Rehabilitation Act.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	ii
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
STATUTE INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	11
I. THE FIRST QUESTION PRESENTED HAS SPLIT THE CIRCUIT COURTS AND THIS COURT HAS NEVER OPINED UPON WHETHER A DISABLED INDIVIDUAL MUST PROPOSE A "TRIAL-READY" ACCOMMODATION	11
II. QUESTION 2 ADDRESSES THE SIXTH CIRCUIT COURT OF APPEALS DEPARTURE FROM THE EMPLOYER'S DUTY TO ACCOMMODATE AN INDIVIDUAL WITH DISABILITY AND CONCLUSION THAT AN OFFER TO ASSIST AN INDIVIDUAL IN FINDING EMPLOYMENT WITH ANOTHER EMPLOYER SATISFIES THE DEFENDANT'S OBLIGATION TO PROPOSE A REASONABLE ACCOMMODATION TO AN OTHERWISE QUALIFIED INDIVIDUAL WITH A DISABILITY	18

TABLE OF CONTENTS – Continued

Page

III. THIS CASE PRESENTS AN EXCELLENT VEHICLE FOR DECIDING THE QUESTIONS PRESENTED 20

CONCLUSION 22

APPENDIX

Court of Appeals opinion ..... App. 1

District Court opinion ..... App. 24

District Court judgment ..... App. 47

Court of Appeals order ..... App. 48

TABLE OF AUTHORITIES

Page

CASES

Beck v. University of Wisconsin Board of Regions, 75 F.3d 1130 (7th Cir. 1996) 15

Bultemeyer v. Ft. Wayne Comm. Schools, 100 F.3d 128 (7th Cir 1996) 18

Cutrera v. Board of Supervisors of Louisiana State University, 429 F.3d 108 (5th Cir. 2005) 14, 15

Equal Employment Opportunity Commission v. Chevron Phillips Chemical Co., 570 F.3d 606 (5th Cir. 2009) 14, 15

Fjellestad v. Pizza Hut of America, Inc., 188 F.3d 944 (10th Cir. 1999) 15, 16, 17

Grenier v. Cyanamid Plastics, Inc., 70 F.3d 667 (1st Cir. 1995) 15

Taylor v. Phoenixville School District, 174 F.3d 142 (3rd Cir. 1999) 17

Taylor v. Phoenixville School District, 184 F.3d 296 (3rd Cir. 1999) 17

Tobin v. Liberty Mutual Insurance Company, 433 F.3d 100 (1st Cir. 2005) 14

STATUTES

28 U.S.C. § 1254(1) 1

29 U.S.C. § 794 3

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 12112 ..... *passim*

Ohio Revised Code Chapter 4112 ..... 3, 4

REGULATIONS

29 C.F.R. §1630.02(o)(3) 13

29 C.F.R. part 1630.9 App. 13, 14, 15

Petitioner Martin Jakubowski respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on December 8, 2010.

OPINIONS BELOW

The December 8, 2010 opinion of the court of appeals, is reported at 627 F.3d 195 (6th Cir. 2010), and is set out at App. 1-App. 23 of the Appendix. The January 24, 2011 order of the court of appeals denying rehearing and rehearing en banc, which is not reported, is set out at App. 47 of the Appendix. The August 3, 2009 order of the district court, which is not officially reported, is set out at App. 24-App. 47 of the Appendix.

STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on December 8, 2010. A timely petition for rehearing en banc was denied on January 24, 2011. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Americans with Disabilities Act, 42 U.S.C. § 12112 provides in pertinent part:

> (A) General Rule
>
> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of the employees, employee compensation, job training, and other terms, conditions, and privileges of employment.
>
> (B) Construction
>
> * * *
>
> (5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or
>
> (B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodations to the physical or mental impairments of the employer applicant.
>
> * * *

In addition, the Rehabilitation Act, 29 U.S.C. § 794, provides in pertinent part:

> (A) Promulgation of rules and regulations
>
> No otherwise qualified individual with the disability in the United States as defined in Section 705.20 of this Title, shall solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of or be subjected to discrimination under any program or activity receiving federal financial assistance or under any program or activity conducted by an executive agency of the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments of the section made by the rehabilitation, comprehensive services, and developmental disabilities act of 1978. Copies of any proposed regulations shall be submitted to appropriate authorizing committees of the congress, and such regulations may take effect no earlier than the thirtieth day after the date on which regulation is to be submitted to such committees.

* * *

Finally, for purposes of this petition, Ohio Revised Code Chapter 4112 which prohibits discrimination on the basis of handicap under Ohio state law provides in pertinent part:

> It shall be an unlawful discriminatory practice:

> (A) for any employer, because of . . . disability . . . to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

The Sixth Circuit and District Court correctly noted that the Rehabilitation Act and Ohio Revised Code § 4112.02 are interpreted under the same legal framework as the Americans with Disabilities Act. (App. 11 and 33)

STATEMENT OF THE CASE

Dr. Jakubowski suffers from Asperger Syndrome ("Asperger"). Asperger is sometimes called "high functioning autism" and is considered "one of the five pervasive developmental disorders known as the autism spectrum and disorders." The "common characteristics of Asperger Syndrome" include underdeveloped social skills, underdeveloped communication skills and repetitive routines/perseveration. (DSM-IV 1994). Individuals with Asperger may also have "deficits in tactile perception, psychomotor coordination, and/or visual spatial organization." However, Jakubowski's condition went undiagnosed throughout his childhood and early adult years.

Despite his undiagnosed Asperger Syndrome, Dr. Jakubowski graduated *cum laude* from Stony Brook

University. Thereafter, he enrolled in medical school at the Poznan University of Medical Sciences in Poznan, Poland. After graduating from medical school and following a "scramble process," St. Elizabeth Hospital in Youngstown, Ohio, offered Dr. Jakubowski a family medicine resident position and he began his residency in July of 2005. Admittedly, Dr. Jakubowski struggled with his clinical practice and, in particular, combining his medical knowledge with patient interaction. The Director of the Residency Program (Dr. Krafft) initially attributed Dr. Jakubowski's problems, at least in part, to his foreign medical training. In October of 2005, Dr. Krafft placed Jakubowski on a remediation program which included sending Dr. Jakubowski to a psychologist for evaluation. Dr. John Edwards evaluated Dr. Jakubowski but did not perform any neuropsychological testing. He concluded that Dr. Jakubowski had a "normal psychological state." Dr. Jakubowski's Asperger remained undiagnosed at this time.

The St. Elizabeth Residency Program attempted to assist Dr. Jakubowski through the remediation process. Dr. Jakubowski continued to struggle in the St. Elizabeth Program despite the remediation program and in June of 2005 he was advised by Dr. Krafft that St. Elizabeth was not going to renew his contract for the second year of his residency.

Dr. Jakubowski recognized that he had deficiencies in his clinical performance and attributed it to insufficient clinical training in medical school. Thus, Dr. Jakubowski enrolled in a program at New York

Medical College ("NYMC") that provided a year of supervised medical training designed to improve his clinical skills. Dr. Jakubowski then resigned from the St. Elizabeth Residency Program.

In the NYMC program, Dr. Jakubowski worked in various fields of medicine, including internal medicine, family medicine, surgery, pediatrics, psychiatry, and OB/GYN, at St. Vincent Medical Center in Bridgeport, Connecticut. He spent two to four weeks in each field. In April of 2007, Dr. Jakubowski also participated in an elective family medicine rotation at TCH, after he had been admitted into the TCH family medicine residency program.

As part of the NYMC program, Dr. Jakubowski received written evaluations at the conclusion of each rotation. The documentation demonstrated Dr. Jakubowski's successful completion of the program and his qualifications for continuing his medical training. In this regard, the evaluations reflected assessments of Dr. Jakubowski in five categories of medicine, the grades are as follows:

- Internal Medicine and Family Medicine – high pass
- OB/GYN – pass
- Pediatrics – high pass
- Psychiatry – high pass
- Surgery – high pass

The individual assessments prepared by supervising physicians during Dr. Jakubowski's individual rotations were equally complimentary. Dr. Jakubowski received marks of outstanding or superior in at least one category on 12 out of 17 evaluations.

Dr. Jakubowski was accepted into The Christ Hospital Family Medical Residency Program (FMRP) in March, 2007. Having been accepted into the FMRP, Dr. Jakubowski arranged to take his remaining one month elective rotation for the NYMC Program at The Christ Hospital in April of 2007. Following this one month rotation Dr. Jakubowski was rated largely satisfactory but needing improvement. In one competency evaluation, Dr. Jakubowski was rated as satisfactory. Overall, Dr. Jakubowski received a passing grade and commented that "Jakubowski showed significant improvement during the month" and that "he has been receptive to feedback, which is very encouraging."

The Christ Hospital then held a one-month orientation for the month of July 2007 for the incoming residents. Each resident participated in five supervised patient encounters and underwent their testing for medical knowledge and emotional intelligence. Further, each resident attended educational programs. It is admitted by Defendants that from a clinical standpoint, Dr. Jakubowski's performance in the orientation month was satisfactory overall.

In addition to clinical aspects of the orientation, each of the residents took an examination that tested

their medical knowledge. This in-training examination is typically given to first year residents in November after they have been in a residency program for a full four months. TCH elected to give the incoming residents the previous year's exam as a way to gauge their fund of medical knowledge. Dr. Jakubowski placed in the 90th percentile on the exam among all first year residents based upon the scoring conducted from the previous year. His strengths are described as "overall medical knowledge is quite strong."

Also, during the same orientation program, all incoming residents took an emotional intelligence exam. This examination gave the first objective indication that a potential pathology or disability existed. The emotional intelligence examination suggested that Dr. Jakubowski had "severe deficiencies in overall emotional intelligence." Dr. Jakubowski had deficiencies in "self-awareness, social competence and relationship management" which would need "immediate attention and . . . require considered effort." As a result of this examination, The Christ Hospital and Dr. Diller questioned, for the first time, whether Dr. Jakubowski could be a family physician.

Dr. Diller reflected on Dr. Jakubowski's performance in his NYMC elective performed in April of 2007, his performance during orientation, and his performance on the emotional intelligence exam. He concluded that Dr. Jakubowski was suffering from a cognitive disorder. Dr. Diller openly discussed his suspicion that Dr. Jakubowski suffered from Asperger.

He arranged a formal psychological evaluation of Dr. Jakubowski. While TCH considered having him evaluated by the Kelly O'Leary Center for Autism Spectrum Disorders at Children's Hospital, they ultimately referred him to Dr. Linda Hartmann, a psychologist and mother of a former resident in the TCH FMRP. Dr. Diller arranged for Dr. Hartmann to evaluate Dr. Jakubowski on August 1, 2007 – the first day of Dr. Jakubowski's rotation in the in-patient service at TCH. He expressly asked Dr. Hartmann to "rule out" Asperger.

Following her evaluation on August 1, 2007, Dr. Hartmann provided a written psychological report to Dr. Diller sharing her assessment. Based upon her evaluation of Dr. Jakubowski, she was unable conclusively to diagnose him with Asperger, but she concluded he exhibited many of its characteristics and that she needed to speak with his mother about his childhood before forming a final diagnosis. Dr. Hartmann expressly recognized that stress was likely to exacerbate his symptoms but concluded that "if he is able to gain perspective on these areas of difficulty, he may be able to adjust his interaction style to be more interpersonally appropriate and effective. In addition, if he can see his colleagues and supervisors as being supportive, he may be able to reduce the level of defensiveness and cynicism that he has been presenting." Indeed, Dr. Hartmann recognized immediately the framework of a potential accommodation for Dr. Jakubowski.

Concurrent with Dr. Hartmann's assessment, the Advancement and Advisory Committee ("AAC") of the FMRP met on August 15, 2007, and recommended that Jakubowski be placed on remediation, at least according to the original minutes of the meeting. On August 22, 2007 the Defendants purportedly created a "Summary of Advisory and Advancement Meeting" which, contrary to the prior notes, asserted that the committee voted unanimously to remove Dr. Jakubowski from the program. The Sixth Circuit ignored this incongruity.

On August 24, 2007, Dr. Jakubowski was told that he had failed his in-patient rotation and that he would have to repeat it. On August 25, 2007, Dr. Hartmann communicated her diagnosis of Asperger Syndrome to Dr. Jakubowski. Thereafter, on August 27, 2007, Dr. Diller terminated Jakubowski from the residency program, less than four weeks into his clinical rotation and four weeks after Dr. Diller first suspected that Dr. Jakubowski suffered from Asperger Syndrome. He terminated him purportedly without ever consulting Dr. Hartmann about potential accommodations.

On September 11, 2007 Dr. Jakubowski and his counsel met with Dr. Diller to discuss Dr. Jakubowski's condition and possible accommodations. Without ever consulting any expert in the field, including the psychologist who diagnosed Dr. Jakubowski at Dr. Diller's request, Dr. Diller and The Christ Hospital rejected all proposed accommodations

and offered no alternative. Defendants effectively ended plaintiff's medical career.

Thereafter, Dr. Jakubowski brought suit under the Americans with Disabilities Act, the Rehabilitation Act and Ohio's anti-discrimination laws. The District Court granted summary judgment and the Sixth Circuit Court of Appeals affirmed, holding for the first time, that the "sufficiency of an ADA Plaintiff's showing that he is otherwise qualified must be analyzed exclusively in light of the scope of the accommodation that he requested from his employer prior to his termination from his position." (Judge Cole, concurring opinion summarizing holding of majority, App. 20)

REASONS FOR GRANTING THE WRIT

I. THE FIRST QUESTION PRESENTED HAS SPLIT THE CIRCUIT COURTS AND THIS COURT HAS NEVER OPINED UPON WHETHER A DISABLED INDIVIDUAL MUST PROPOSE A "TRIAL-READY" ACCOMMODATION

Seventeen days after being diagnosed with Asperger Syndrome (September 11, 2007), and prior to having the opportunity to consult with experts in the field of Asperger Syndrome, Dr. Jakubowski asked for an accommodation. The Defendants, The Christ Hospital and Dr. Phillip Diller rejected the initial accommodation, failed to consider the information

provided by Dr. Jakubowski and his attorney about Asperger Syndrome and rejected, out of hand, all proposed accommodations. Rather, Dr. Diller conditionally offered to find Dr. Jakubowski a residency program in the field of pathology at another hospital, but only if he did not contest his termination. On December 8, 2010, the Sixth Circuit Court of Appeals concluded that this conduct satisfied the obligations of the employer to engage in an interactive process. The holding of the court conflicts with other Circuit Courts, the EEOC implementing regulations and the EEOC interpretive guidance.

The Sixth Circuit held that "the employee is saddled with the burden of proposing an accommodation and proving that it is reasonable." (App. 14) The Court found that "[b]ecause the accommodations – that Jakubowski had the burden to propose – do not address a key obstacle preventing him from performing a necessary function of a medical resident, he has not met his burden under the Act of proving he is an otherwise qualified individual . . . " (App. 15)[1] Though ample evidence existed that remediation was appropriate, feasible and a reasonable accommodation, the Court found it was of little import because

[1] At the summary judgment stage, Plaintiff provided the affidavits and reports of two medical experts, Dr. Linda Geller and Dr. Schott Hirsch who opined that Dr. Jakubowski could be accommodated through a remediation program similar to a program offered to a non-disabled physician with similar, if not worse, performance problems.

Dr. Jakubowski did not ask for remediation at the time of the meeting with Dr. Diller. Thus, in the words of Judge Cole, in his concurring opinion, the majority opinion held for the first time that an ADA plaintiff is required to "muster a trial-ready accommodation proposal for his employer prior to termination" in order to successfully prove that his "employer unlawfully discriminated against the employee based on his disability." (App. at 19). The Sixth Circuit has "never held, as the majority [did], that the sufficiency of an ADA Plaintiff's showing that he is otherwise qualified must be analyzed exclusively in light of the scope of the accommodation that he requested from his employer prior to his termination from his position." (App. 20).

The Code of Federal Regulations requires that the interactive process "identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." 29 C.F.R. §1630.02(o)(3). The EEOC Interpretive Guidance on Title I of the Americans with Disabilities Act provides:

> . . . the employer must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is best determined to be a flexible, interactive process that involves both the employer and the [employee] with a disability.

See 29 C.F.R. Part 1630, App.

The EEOC Interpretive Guidance promulgated to interpret Title I of the ADA provides that "in some instances neither the individual requesting the accommodation nor the employer can readily identify the appropriate accommodation." (*Id.*) In such instances employers may be required to find "technical assistance" in determining "how to accommodate the particular individual." 29 C.F.R. part 1630.9

Other Circuit Courts have ruled consistent with the implementing regulations and the EEOC interpretive guidelines. For example, the Fifth Circuit Court of Appeals held that "[o]nce an employee makes [a request for accommodation], . . . the employer is obligated by law to engage in a 'interactive process': 'a meaningful dialogue with the employee to find the best means of accommodating that disability.'" *Equal Employment Opportunity Commission v. Chevron Phillips Chemical Co.*, 570 F.3d 606, 621 (5th Cir. 2009); citing *Tobin v. Liberty Mutual Insurance Company*, 433 F.3d 100, 108 (1st Cir. 2005). Indeed, the Fifth Circuit Court of Appeals concluded that if an "employer does not engage in a good faith interactive process, that employer violates the ADA – including when the employer discharges the employee instead of considering the requested accommodations." *Id.*, citing *Cutrera v. Board of Supervisors of Louisiana State University*, 429 F.3d 108, 113 (5th Cir. 2005) ("an employer may not stymie the interactive process of identifying a reasonable accommodation for an employee's disability by preemptively terminating the employee before an accommodation

can be considered or recommended."). In stark contrast to the holding of the Sixth Circuit Court of Appeals in this case the Fifth Circuit noted that the employee was not required to come up with the solution on her own. The Court observed that "the employer is required to engage in the interactive process so that *together* they can determine what reasonable accommodations might be available." *Id.* at 621-622, citing *Cutrera*, 429 F.3d at 113.

The Seventh Circuit Court of Appeals, giving significant deference to the EEOC's implementing regulations has held that the "employer has at least some responsibility in determining the necessary accommodation." See *Beck v. University of Wisconsin Board of Regions*, 75 F.3d 1130 (7th Cir. 1996). Citing the Federal Regulations, the Court noted that a reasonable accommodation "is best determined through a flexible, interactive process that involves both the employer and the [employee] with a disability." *Beck v. University of Wisconsin Board of Regions,* 75 F.3d 1130, 1135 (7th Cir. 1996), citing 29 C.F.R. part 1630, App., *Grenier v. Cyanamid Plastics, Inc.*, 70 F.3d 667, 677 (1st Cir. 1995).

In *Fjellestad v. Pizza Hut of America, Inc.* 188 F.3d 944 (10th Cir. 1999), the Eighth Circuit Court of Appeals noted the differing treatment by the Federal Circuit Courts of the employer's obligation to engage in a good faith interactive process. The Court noted that the Third Circuit Court of Appeals, the Seventh Circuit Court of Appeals and the Fifth Circuit Court of Appeals have concluded that both parties have a

duty to act in good faith and assist in the search for appropriate reasonable accommodations. *Id.* at 951. Conversely, the Court noted that the Ninth Circuit, the Eleventh Circuit and the Tenth Circuit have concluded that no obligation exists and that an employer cannot be held independently liable under the ADA for simply failing to engage in the interactive process to determine a reasonable accommodation. *Id.* The Eighth Circuit Court of Appeals, when considering the interpretive guidelines, found that an employer should not be held liable under the ADA simply for failing to engage in an interactive process "if no reasonable accommodation was possible." However, the Court further found that a failure of an employer to engage in an interactive process to determine whether reasonable accommodations are possible, represents *prima facie* evidence that an employer may be acting in bad faith. *Id.* at 952. On balance, the Eighth Circuit Court of Appeals concluded that summary judgment is typically precluded when there is a genuine dispute as to whether the employer acted in good faith and engaged in an interactive process of seeking reasonable accommodations. *Id.* at 953. If the "employee has evidence that the employer did not act in good faith in the interactive process, . . . we will not readily decide on summary judgment that accommodation was not possible and that the employer's bad faith could have no effect." *Id.* at 954. "To assume that the accommodation would fail regardless of the employer's bad faith would effectively eliminate the requirement that

employer's participate in the interactive process." *Id.* at 954.

The Sixth Circuit Court of Appeals decision is most starkly in conflict with *Taylor v. Phoenixville School District,* 184 F.3d 296 (3rd Cir. 1999) (*Taylor II*). In *Taylor II,* the court concluded that "[t]he interactive process, as the name implies, requires the employer to take some initiative." *Taylor II*, 184 F.3d at 315. Elsewhere, the court noted that the "interactive process would have little meaning if it was interpreted to allow employers, in the face of a request for an accommodation, simply to sit back passively, offer nothing, and then in post-termination litigation, try to knock down every specific accommodation as too burdensome." *Id.* An employer who receives notice that an accommodation has been requested "cannot escape its duty to engage in the interactive process simply because the employee did not come forward with a reasonable accommodation that would prevail in litigation." See *Taylor v. Phoenixville School District,* 174 F.3d 142, 162 (3rd Cir. 1999) (*Taylor I*) rehearing granted, 184 F.3d 296 (3rd Cir. 1999) (*Taylor II*).

Taylor I and *II* recognize that it makes "little sense to insist that the employee must have arrived at the end product of the interactive process before the employer has a duty to participate in that process." An employer "cannot escape its duty to engage in the interactive process because the employee did not come forward with a reasonable accommodation that would prevail in litigation." *Taylor* at 162. Yet,

that is exactly the holding of the Sixth Circuit Court of Appeals.

Likewise, the Seventh Circuit Court of Appeals views the employer obligation much differently than the majority panels holding. See *Bultemeyer v. Ft. Wayne Comm. Schools*, 100 F.3d 128 (7th Cir 1996). In *Bultemeyer*, the Seventh Circuit held that the "employer has to meet the employee halfway, and if it appears that the employee may need an accommodation but doesn't know how to ask for it, the employer should do what it can to help." *Bultemeyer*, 100 F.3d at 1285. In reversing an award of summary judgment, the *Bultemeyer* court concluded that the Defendant had "tried to take advantage of what it saw as an opportunity to rid itself of a problem, a disabled employee."

II. QUESTION 2 ADDRESSES THE SIXTH CIRCUIT COURT OF APPEALS DEPARTURE FROM THE EMPLOYER'S DUTY TO ACCOMMODATE AN INDIVIDUAL WITH DISABILITY AND CONCLUSION THAT AN OFFER TO ASSIST AN INDIVIDUAL IN FINDING EMPLOYMENT WITH ANOTHER EMPLOYER SATISFIES THE DEFENDANT'S OBLIGATION TO PROPOSE A REASONABLE ACCOMMODATION TO AN OTHERWISE QUALIFIED INDIVIDUAL WITH A DISABILITY

Literally, for the first time since the enactment of Title I of the Americans with Disabilities Act, a

Federal Circuit Court has concluded that an employer discharges their obligation to reasonably accommodate an otherwise qualified individual by conditionally offering to assist them to find a job with another employer. The ramifications of this decision are profound.

The Americans with Disabilities Act provides that no "covered entity" shall discriminate against a qualified individual with a disability because of the disability of such individual. The statute further obligates employers to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability. 42 U.S.C. § 12112.

The implementing regulations of the Americans with Disabilities Act provides in pertinent part:

> (A) It is unlawful for a covered entity not to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified . . . employee with a disability, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business.
>
> (B) It is unlawful for the covered entity to deny employment opportunities to an otherwise qualified job applicant or employee with a disability based on the need of such covered entity to make reasonable accommodations to such individual's physical or mental impairments.

Both the Americans with Disabilities act and the implementing regulations make it clear that an employer has a duty to accommodate an individual with a disability. Both the statute and the regulations also make clear that offering to find a qualified individual with a disability a position with another employer, so that another covered entity can accommodate the disability, does not discharge that employer's obligation. In the present case, the Sixth Circuit Court of Appeals found that the employer acted in "good faith" by proposing to help Dr. Jakubowski find another residency program, conditioned upon him not appealing his discharge. To permit employers to delegate their accommodation obligation under the Americans with Disabilities Act would frustrate the purpose of the statute. Accordingly, this Court should review this novel and unwarranted interpretation of the Americans with Disabilities Act to prevent further departure from the clear and express language of the statute itself.

III. THIS CASE PRESENTS AN EXCELLENT VEHICLE FOR DECIDING THE QUESTIONS PRESENTED

This case is an excellent vehicle for resolving the questions presented herein. This matter was decided on dispositive motion. Facts at the lower court level were clearly in dispute as to whether the Plaintiff's experts proposed accommodations satisfied Plaintiff's burden of demonstrating that he is an otherwise qualified individual with a disability. The majority

opinion from the Sixth Circuit decided the case based upon the proposed accommodation presented by Dr. Jakubowski in his initial meeting on September 11, 2007 and thus, disregarded the expert testimony. The Court failed to consider alternative accommodations available to the Plaintiff, including accommodations previously provided to non-disabled individuals by the Defendant on the premise that the Plaintiff had not presented a request for an accommodation that satisfied the concept of a "trial ready" accommodation, i.e. an accommodation that could be proven at trial which permit him to perform all of the essential functions of his job.

The questions presented have significant practical importance to all individuals with disabilities requesting accommodations. It defines the limitations and obligations of employees and employers in the workplace when seeking to provide reasonable accommodation. The conflicts presented throughout the circuits demonstrate the ambiguity that exists regarding the employer's role in defining a reasonable accommodation. The decision herein ultimately turned upon a legal interpretation by this Court of the scope of the Americans with Disabilities Act, and the nature of the employer's duty to identify and provide reasonable accommodations with individuals with disabilities following a good faith interactive process. As required by the Equal Employment Opportunity Commission's implementing regulations.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

RICHARD C. HABER (0046788)
HABER POLK KABAT LLP
737 Bolivar Road, Suite 4400
Cleveland, Ohio 44115
Phone: (216) 241-0700
Fax: (216) 241-0739
E-mail: rhaber@haberpolk.com

Counsel of Record
Counsel for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARTIN JAKUBOWSKI,

Plaintiff-Appellant,

v.

THE CHRIST HOSPITAL, INC., and PHILIP DILLER,

Defendants-Appellees.

No. 09-4097

Appeal from the United States District Court for the Southern District of Ohio at Cincinnati.
No. 08-00141 – S. Arthur Spiegel, District Judge.

Argued: October 21, 2010

Decided and Filed: December 8, 2010

Before: MARTIN, COLE, and CLAY, Circuit Judges.

COUNSEL

ARGUED: Richard C. Haber, HABER POLK LLP, Cleveland, Ohio, for Appellant. Michael A. Roberts, GRAYDON HEAD & RITCHEY LLP, Cincinnati, Ohio, for Appellees. **ON BRIEF:** Richard C. Haber, HABER POLK LLP, Cleveland, Ohio, for Appellant. Michael A. Roberts, Katherine M. Lasher, GRAYDON HEAD & RITCHEY LLP, Cincinnati, Ohio, for Appellees.

MARTIN, J., delivered the opinion of the court, in which CLAY, J., joined. COLE, J. (pp. 13-16),

delivered a separate opinion concurring in the judgment.

OPINION

BOYCE F. MARTIN, JR., Circuit Judge. Plaintiff-appellant Martin Jakubowski suffers from Asperger's Disorder[1] and was formerly employed as a family practice medical resident at The Christ Hospital, Inc. in Cincinnati, Ohio. He filed suit against Christ Hospital and the director of his program there, Dr. Philip Diller, after he was terminated from his position. Jakubowski claims that Christ Hospital and Diller terminated him because of his Asperger's and failed to reasonably accommodate this disability, in violation of the Americans with Disabilities Act, 42 U.S.C. § 12112, the Rehabilitation Act, 29 U.S.C. § 794, and Ohio Revised Code § 4112.02. Christ Hospital and Diller moved for summary judgment,

[1] Asperger's Disorder is characterized by "severe and sustained impairment in social interaction . . . and the development of restricted, repetitive patterns of behavior, interests, and activities." AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 80 (4th ed. 2000). "The disturbance must cause clinically significant impairment in social, occupational, or other important areas of functioning. . . ." *Id.* "The impairment in reciprocal social interaction is gross and sustained. There may be marked impairment in the use of multiple nonverbal behaviors . . . to regulate social interaction and communication. . . ." *Id.*

which the district court granted. Jakubowski now appeals. We **AFFIRM**.

I. BACKGROUND

In 2003, Jakubowski graduated from the University of Medical Sciences in Poznan, Poland. He unsuccessfully attempted to obtain a medical residency in the United States through the "match" process, by which hospitals and residency prospects choose each other. However, he obtained a residency position at St. Elizabeth Hospital in Youngstown, Ohio through the "scramble" process, which allows applicants who were unsuccessful in the match process to find remaining residency positions. In July 2005, he began his residency, but struggled and did not perform well. He was placed in a remediation program in October to improve his areas of weakness, but at the end of his first year, he was informed that St. Elizabeth would not renew his contract for a second year.

Recognizing that his clinical and patient skills were weak compared to graduates of American medical schools, Jakubowski enrolled at the New York Medical College for a year-long program of supervised clinical training. There, he received mixed reviews, with the negative evaluations focused on his lack of communication skills.

After this program, Jakubowski looked for a second residency. He again participated in the match process with no success, but found a residency through the scramble process at Christ Hospital in

Cincinnati. He began his residency there in July 2007. During an initial month-long orientation, he again received mixed reviews. While he placed in the ninetieth percentile nationally on a medical knowledge exam, he performed poorly on an emotional intelligence exam, and supervising physicians noted his weak communication skills with patients. Supervisors identified self-awareness, social competence, and relationship management as areas of deficiency for Jakubowski. Additionally, an attending physician, Dr. Jeffrey Morgeson, observed that when working with patients, Jakubowski had poor organizational skills, skipped standard procedures in his examinations, and performed procedures incorrectly.

At the conclusion of orientation, Diller suspected that Jakubowski suffered from a cognitive disorder. Diller referred him to Dr. Linda Hartmann for a psychological evaluation, and specifically to determine if he had Asperger's. Diller did not make his suspicions known to other attending physicians at Christ Hospital.

During Jakubowski's first night on call after orientation, he was unable to keep up the necessary pace in seeing patients. His supervising physician had to relieve him, and noted that Jakubowski could not properly relay instructions between healthcare professionals. During the first week of August, one attending physician, Dr. Ellis, criticized his performance and recommended that he be placed on remediation. He noted that Jakubowski had an average to below average medical knowledge, had difficulty exploring

possible diagnoses, did not communicate with the nurses well, and had difficulty answering, and communicating on, the phone. Another attending physician, Dr. Bernheisel, remarked that Jakubowski could not be trusted and had given dangerous orders that would have harmed patients if not caught by other physicians. In another instance, Jakubowski wrote an unclear order for medication for a patient that, if interpreted and administered literally, would have killed the patient. Jakubowski never actually harmed a patient during his residency.

On August 8, Hartmann sent a letter to Diller explaining that she suspected that Jakubowski had Asperger's, but she could not be sure without speaking to Jakubowski's family about his past.

On August 24, Bernheisel informed Jakubowski that he had failed his inpatient rotation and he would have to repeat it.

On August 25, Hartmann formally diagnosed Jakubowski and informed him that he had Asperger's. That same day, Jakubowski received a letter from Diller informing him that he would be terminated from his residency on September 30. At that time, Diller had not yet received Hartmann's letter explaining her potential diagnosis because it had been lost in office mail. Jakubowski met with Diller, Bernheisel, and another attending physician, Dr. Jeffrey Schlaudecker, that same day and informed them that he had been diagnosed with Asperger's.

On September 11, Jakubowski's attorney sent a letter to Christ Hospital proposing that it accommodate Jakubowski's disability with "knowledge and understanding." The letter explained that Jakubowski could successfully continue his residency if the other physicians and nurses were made aware of his condition and the symptoms and triggers of Asperger's. Jakubowski conceded he would have to improve his communication skills with patients, but insisted that he could do this alone. The parties then met to discuss the proposed accommodation, at which time Diller informed Jakubowski that Christ Hospital did not have sufficient resources to comply with the proposal. However, Diller offered to assist Jakubowski in finding a residency in pathology, a field that requires little or no patient interaction.

Jakubowski appealed his termination to the graduate medical education committee at Christ Hospital. On December 18, the committee affirmed his termination.

Lynda Geller, Ph.D. presented expert testimony during discovery that there are many ways Christ Hospital could have accommodated Jakubowski's Asperger's. She also presented evidence of a remediation program that Christ Hospital had previously offered a struggling resident. The previous resident had difficulty following instructions from other physicians for treatment, adjusting treatment plans as new information was obtained, applying medical knowledge to clinical interactions with patients, and making timely diagnoses. As part of his remediation

program, Christ Hospital paused his rotation for four months, assigned an attending physician to monitor him while he saw patients three mornings a week, assigned a medical faculty member to monitor him one morning a week, assigned Bernheisel to work with him and fifteen patients a month, gave him a full day every week to study, and assigned him a personal mentor to improve his medical knowledge. If the resident did not improve in the initial four months, he would be able to continue the remediation for an additional four months. Geller opined that this resident's shortcomings were similar to Jakubowski's, and that Christ Hospital could have offered a similar remediation program to Jakubowski. Geller testified that her recommendations had nothing to do with patient safety. She did not purport to have any expertise in patient safety, and had no opinion regarding how Jakubowski's Asperger's would affect patient safety. Geller's testimony and observations regarding the previous resident were not available when Jakubowski and Diller met to discuss accommodations as she was an expert witness obtained later for litigation purposes. Jakubowski did not propose a remediation program as part of his proposed accommodation at the meeting with Diller.

Jakubowski described his condition during discovery, saying that he has trouble communicating his thoughts to people and processing what people communicate to him. He also said he could have trouble gathering data.

A medical expert, Dr. Jeffery Chaudhari, who had previously worked with Jakubowski in New York, testified during discovery for Christ Hospital. He opined that being a physician requires excellent skills in relating to patients and co-workers. He also rated Jakubowski's performance as "sub-par," and remembered that Jakubowski had difficulty relating to colleagues and gathering information from a patient and integrating it. Another medical expert who had experience with Jakubowski at St. Elizabeth, Dr. Rudolph Krafft, also testified during discovery for Christ Hospital. He stated that "getting information from patients accurately" is "very important" for a physician, and that a physician would be "unqualified" if he had "no ability" to pick up on the subtleties of human interaction.

Two other physicians at Christ Hospital, Drs. Vasyl and Martin, evaluated Jakubowski with the following descriptions: "clueless, reports data incorrectly, not trusted, has no concept of his patients, leaves out outpatient information, says yes to things but has not done [them], lack of insight, lack of organization, unable to communicate, lack of attention," and "presents untruth [sic]."

Dr. Donald Swikert, director of the Family Medicine Residency Program at St. Elizabeth, worked with Jakubowski there and also testified during discovery for Christ Hospital. He recalled that Jakubowski exhibited deficiencies that put patients in danger. He also opined that the accommodations recommended by Geller would be unreasonable for the following

reasons: (1) "[Christ Hospital] would be responsible for freeing up significant time from educational and patient care training for an indefinite period of time and for an indefinite frequency;" (2) "these recommendations would require significant patient care coverage issues by faculty and residents;" (3) "the recommendations would have a significant adverse impact on the Program, particularly the training of other residents because they would be pulled from their usual responsibilities and educational opportunities;" (4) "the Program would have to free-up significant physician time so as to effectively work with Martin Jakubowski;" (5) "patients would have to be actively recruited who would be willing to participate in such a remediation program;" and (6) "sixty observed patient evaluations and the subsequent analysis, review and work with Martin Jakubowski to address the broad scope of deficiencies would take, at a minimum, months to accomplish and would significantly impact the resources available for the training of other residents in the Program." Furthermore, Swikert added "that the accommodations proposed by Lynda Geller, Ph.D. and Martin Jakubowski do not consider the significant patient care and patient safety concerns."

II. STANDARD OF REVIEW

"The Sixth Circuit reviews de novo a district court's grant of summary judgment." *Hamilton v. Starcom Mediavest Group, Inc.*, 522 F.3d 623, 627 (6th Cir. 2008). "Summary judgment is proper where

no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The party seeking summary judgment bears the initial burden of showing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). After the moving party has met its burden, the burden shifts to the nonmoving party, who must present some "specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). When considering a motion for summary judgment, the district court must view the evidence in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

III. DISCUSSION

Jakubowski claims that the district court improperly granted summary judgment in favor of Christ Hospital. Specifically, he argues that the district court erred by: (1) concluding that he was not an "otherwise qualified" individual pursuant to the Disabilities Act, the Rehabilitation Act, and Ohio's discrimination laws; (2) impermissibly weighing evidence and deciding that the proposed accommodations were not reasonable; (3) finding that no genuine issue of material fact existed as to whether Christ Hospital engaged in a good faith interactive process to accommodate his disability; (4) failing to afford reasonable inferences in his favor and incorrectly concluding that Christ Hospital satisfied its burden of proof regarding

the "direct threat" defense; and (5) concluding that the proposed accommodations created an undue hardship. In response, Christ Hospital claims that: (1) no reasonable accommodation existed; (2) Jakubowski's proposed accommodations posed an undue hardship for Christ Hospital and a direct threat to Jakubowski's patients; (3) Christ Hospital engaged in the interactive accommodation process in good faith with Jakubowski; (4) Christ Hospital's decision to terminate Jakubowski was based on his poor performance and patient safety; and (5) Jakubowski's concealment of his past, failed residencies at other hospitals was reason enough for him to be terminated.

A. The Americans with Disabilities Act

As an initial matter, analysis of claims made pursuant to the Americans with Disabilities Act applies to claims made pursuant to Ohio Revised Code § 4112.02 and the Rehabilitation Act. *Kleiber v. Honda of Am. Mfg., Inc.*, 485 F.3d 862, 872 (6th Cir. 2007) (citation omitted) (applying Americans with Disabilities Act analysis to claims made pursuant to Ohio Revised Code § 4112.02); *Doe v. Woodford Cnty. Bd. of Educ.*, 213 F.3d 921, 925 (6th Cir. 2000) (the Sixth Circuit discusses claims under the American with Disabilities Act and the Rehabilitation Act concurrently "because the purpose, scope, and governing standards of the 'acts are largely the same, cases construing one statute are instructive in construing the other'" (quoting *McPherson v. Michigan High School Athletic Ass'n, Inc.*, 119 F.3d 453, 460 (6th Cir.

1997))). Therefore, the following discussion of the Americans with Disabilities Act applies to all of Jakubowski's claims.

Pursuant to section 12112(a) of the Act, an employer may not discriminatorily terminate an otherwise qualified individual on the basis of his disability. One form of discrimination occurs when an employer fails to make "reasonable accommodations" to an employee's known disability, unless those accommodations would cause "undue hardship" to the employer. 42 U.S.C. § 12112(b)(5)(A) (2006). "To recover on a claim of discrimination under the Act, a plaintiff must show that: 1) he is an individual with a disability; 2) he is 'otherwise qualified' to perform the job requirements, with or without reasonable accommodation; and 3) he was discharged solely by reason of his handicap." *Monette v. Elec. Data Sys. Corp.*, 90 F.3d 1173, 1178 (6th Cir. 1996).

The district court found that Jakubowski's Asperger's was a disability for purposes of the Act. This conclusion is not disputed by Christ Hospital. Therefore, the issues on appeal concern whether Jakubowski was an otherwise qualified individual for purposes of the Act, which, in turn, depends on the interactive accommodation process between him and Christ Hospital.

B. Reasonable Accommodations and Otherwise Qualified Individuals

Jakubowski claims the district court erred by concluding that he was not an "otherwise qualified" individual. "The term 'qualified individual' means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8) (2008). Essential functions are "fundamental job duties of the employment position the individual with a disability holds." 29 C.F.R. § 1630.2(n)(1) (2010). "[C]onsideration shall be given to the employer's judgment as to what functions of a job are essential. . . ." *Id.*

Christ Hospital identified communicating with professional colleagues and patients in ways that ensure patient safety as an essential function that Jakubowski must be able to perform. Based on the uncontroverted evidence in the record, it appears that many healthcare professionals work together to care for a single patient. The ultimate success of that care requires the patient, physicians, nurses, and technicians to communicate clearly with each other, or else, patients could be harmed or even die. Furthermore, as the employer, Christ Hospital's identification of these functions as essential should be given some consideration. *See* 42 U.S.C. § 12111(8). Accordingly, we agree that there is no dispute that these functions are essential to the work of a family practice physician residency training program. Because Jakubowski admittedly had difficulty performing these functions,

some kind of accommodations would be necessary for him to continue his work. *See id.* § 12112(b)(5)(A). Thus, whether Jakubowski was a qualified individual depends on whether he proposed a reasonable accommodation to account for his disability.

C. Jakubowski's Proposed Accommodations and the Essential Functions of His Position

If a disabled employee requires an accommodation, the employee is saddled with the burden of proposing an accommodation and proving that it is reasonable. *Monette*, 90 F.3d at 1183. Furthermore, the plaintiff has the burden of proving that he will be "capable of performing the essential functions of the job with the proposed accommodation." *Id.* at 1184. Reasonable accommodations may include

> making existing facilities used by employees readily accessible to and usable by individuals with disabilities, job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

42 U.S.C. § 12111(9).

The accommodations that Jakubowski proposed were for "knowledge and understanding" of the hospital physicians and staff. He argued that he would be capable of communicating with them effectively if they knew of his condition and its symptoms and triggers. However, he did not address how this accommodation would improve his communication and interaction with patients, which are parts of the essential function of a family practice resident. Instead, he explained that he would work individually to improve his clinical skills with patients without going into detail as to how he would accomplish this feat. A physician must be able to talk to patients, discern their ailments, and describe treatments to them. Jakubowski's performance evaluations often rated his abilities to communicate with patients and gather information from them as deficient. Because the accommodations – that Jakubowski had the burden to propose – do not address a key obstacle preventing him from performing a necessary function of a medical resident, he has not met his burden under the Act of proving he is an otherwise qualified individual for the position. *See Monette*, 90 F.3d at 1184.

D. The Interactive Accommodation Process

"To determine the appropriate reasonable accommodation it may be necessary for the [employer] to initiate an informal, interactive process with the [employee]." 29 C.F.R. § 1630.2(o)(3) (2010). "This process should identify the precise limitations resulting

from the disability and potential reasonable accommodations that could overcome those limitations." *Id.* Both parties must participate in this process and do so in good faith. *Kleiber*, 485 F.3d at 871. Parties should not obstruct the process, or refuse to participate. *Id.* An employee has the burden of proposing an initial accommodation, and the employer has the burden of showing how the accommodation would cause an undue hardship, but the employer is not required to propose a counter accommodation in order to participate in the interactive process in good faith. *See, e.g.*, *Talley v. Family Dollar Stores of Ohio, Inc.*, 542 F.3d 1099, 1108, 1110 (6th Cir. 2008) (discussing the interactive process but not requiring that the employer make a counter proposal after rejecting the employee's proposed accommodations). Of course, taking the extra step of proposing counter accommodations may be additional evidence of good faith. *See Kleiber*, 485 F.3d at 872 (noting that the employer's visits to the manufacturing line to try to identify appropriate jobs for the employee was evidence of participating in the interactive process in good faith). If an employer takes that step and offers a reasonable counter accommodation, the employee cannot demand a different accommodation. *Hedrick v. W. Reserve Care Sys.*, 355 F.3d 444, 457 (6th Cir. 2004). An employer has sufficiently acted in good faith when it readily meets with the employee, discusses any reasonable accommodations, and suggests other possible positions for the plaintiff. *See Nance v. Goodyear Tire & Rubber Co.*, 527 F.3d 539, 557 (6th Cir. 2008).

Jakubowski contends that Christ Hospital did not act in good faith because it did not offer him a remediation program similar to the one offered to the previous, unnamed resident who exhibited similar deficiencies. Importantly, Jakubowski did not request a remediation program at the accommodation meeting with Christ Hospital. Only as part of this litigation did he contend that Christ Hospital should have volunteered this option.

Christ Hospital, through Diller, met with Jakubowski to discuss his proposed accommodations, and told him that the hospital lacked sufficient resources to comply. Diller also offered to help him find a pathology residency because it would involve less patient contact, thus, accommodating what Diller saw as one of Jakubowski's weaknesses. Because Christ Hospital met with Jakubowski, considered his proposed accommodations, informed him why they were unreasonable, offered assistance in finding a new pathology residency, and never hindered the process along the way, we agree that there is no dispute that Christ Hospital participated in the interactive accommodation process in good faith.

IV. CONCLUSION

Jakubowski's Asperger's causes symptoms that are, in the very least, less than ideal for the successful practice of medicine. Because of his disorder, he has extreme difficulty communicating with colleagues and patients. This difficulty has led to dangerous

possibilities in the past, and multiple physicians that have worked with him professionally have noted his shortcomings. Although he proposed accommodations to help him overcome his disability, they did not address every essential function that a resident must be able to perform. Additionally, it appears that Christ Hospital acted in good faith throughout the interactive accommodation process, thereby fulfilling its duty. Therefore, we **AFFIRM** the district court's grant of summary judgment in favor of Christ Hospital and Diller.

CONCURRING IN THE JUDGMENT

COLE, Circuit Judge, concurring. Though I concur in the majority's judgment I write separately because my view of a disability plaintiff's burden under the Americans with Disabilities Act ("ADA") differs from that of my colleagues.

The majority finds that Jakubowski's claim cannot proceed to trial because he has not put forth evidence sufficient to show that he is qualified to be a family practice resident with reasonable accommodation. While I agree with this conclusion, the majority's analysis incorrectly finds fault in Jakubowski's failure to propose to Christ Hospital an accommodation robust enough to address all of his Asperger's related deficiencies at a meeting between Jakubowski, his attorney and Christ Hospital, which was held

prior to his termination, a little less than three weeks after he was diagnosed with Asperger's, and before he filed suit. By evaluating and rejecting Jakubowski's claim based on his initial accommodation request for knowledge and understanding of Jakubowski's disability from his hospital coworkers, rather than the more comprehensive accommodations Jakubowski set outs through expert testimony in opposition to summary judgment, the majority holds that an ADA discrimination plaintiff must always muster a trial-ready accommodation proposal for his employer prior to termination (or any other adverse employment action) to prove that the employer unlawfully discriminated against the employee based on his disability.

An employer violates the ADA by "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee." 42 U.S.C. § 12112(5)(A). We have interpreted this language to require an ADA plaintiff to make a threshold showing that he is qualified for the relevant position with reasonable accommodation. *See Monette v. Elec. Data Sys. Corp.*, 90 F.3d 1173, 1183 (6th Cir. 1996). As the ADA demands that the employee's disability be "known" to the employer for liability to attach, a plaintiff must generally also have informed his employer of his disability and requested *an* accommodation prior to the time at which an employer takes adverse action against a disabled employee. *See Monette*, 90 F.3d at 1186 n.13 (requiring a plaintiff to show "actual or constructive knowledge

of the disability as part of a *prima facie* case") (internal quotation marks omitted); *Crocker v. Runyon*, 207 F.3d 314, 319-20 (6th Cir. 2000) (employer has no obligation to offer accommodation where employee never requested one) (citing *Kaltenberger v. Ohio College of Podiatric Med.*, 162 F.3d 432, 437 (6th Cir. 1998)).

But we have never squarely held, as the majority does today, that the sufficiency of an ADA plaintiff's showing that he is otherwise qualified must be analyzed exclusively in light of the scope of the accommodation he requested from his employer prior to his termination from his position, even where more ample evidence that a plaintiff is otherwise qualified or that a defendant acted with discriminatory intent, emerges through discovery. The onus to prove – as a matter of law – that an ADA plaintiff can do the job with the right accommodation is triggered by the filing of a discrimination lawsuit, not by the prospect of termination. *See, e.g.*, *Monette*, 90 F.3d at 1183 (describing a disability plaintiff's burden to propose a reasonable accommodation in the context of a discrimination lawsuit). To hold otherwise is counter to the ADA, which forbids employers from discriminating "against a qualified individual on the basis of disability." 42 U.S.C. § 12112(a). The majority's rule impliedly assumes that if the plaintiff does not make an affirmative showing to the employer – prior to termination – that he is a qualified individual with his proposed reasonable accommodation, then the employer necessarily could not have acted with

discriminatory intent in violation of the ADA when it fired him. Yet the fact that an employee does not perfectly convey to his employer the precise accommodation that would allow him to do his job prior to termination does not mean, as a rule, that the *employer* did not know that the employee could perform his work with a reasonable accommodation. If an employer was aware of its own accord that a person was otherwise qualified, a jury could, given other facts consistent with discrimination, permissibly infer that such an employer had acted with discriminatory intent in terminating the employee.

Jakubowski's case is just such an instance where the employer – a teaching hospital – is likely to be in a better position to know what accommodations to his Asperger's symptoms could make him otherwise qualified, than Jakubowski is. But the majority's rule would render whatever inferences of discriminatory intent a jury could draw from any facts related to Christ Hospital's knowledge irrelevant because Jakubowski did not ask Christ Hospital for the right accommodations before he was fired. Of course, such circumstantial evidence would not relieve the plaintiff of his burden to show at trial that he is qualified for the position with reasonable accommodation – whatever that proves to be – but nothing in the ADA or our prior holdings shackles a plaintiff to his initial, pre-termination proposed accommodation as he attempts to clear this significant evidentiary hurdle.

More pointedly, ADA regulations anticipate that an employee may not be in the position to know what

a reasonable accommodation to his condition is; they require that the employee and the employer engage in an interactive process with the end of jointly determining what accommodations are possible and adequate. *See Kleiber*, 485 F.3d at 871 (quoting 29 C.F.R. § 1630.2(o)(3)). The majority holding would undermine the force of this mandatory interactive process by incentivizing employers to withhold potential accommodations in the hopes that the employee will be held to his initial and legally inadequate accommodation in subsequent litigation.

Setting these points of law aside, however, I agree with the majority's conclusion that Jakubowski has failed ultimately to show that he is otherwise qualified. In opposition to summary judgment, Jakubowski attempted to meet that burden by submitting evidence of Asperger's accommodations beyond the "knowledge and understanding" which he initially proposed to Christ Hospital prior to his termination. Nonetheless, Jakubowski's claim fails because even with those additional accommodations (which *do* address all the essential job functions that a family practice medical resident must perform) he has not shown that he was otherwise qualified to be a family practice resident. The fatal flaw is Jakubowski's expert testimony. Though the expert report proposes accommodations that might remedy the performance problems that Christ Hospital cited in its termination of Jakubowski, nothing in the report – or elsewhere in the record – provides a reasonable jury with a basis to conclude that these

accommodations would actually succeed in remedying Jakubowski's Asperger's-related job deficiencies. Because the evidence of the proposed accommodations' likelihood of success is too attenuated for a jury to find in Jakubowski's favor, summary judgment for Christ Hospital is appropriate.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

MARTIN JAKUBOWSKI, M.D.,	:	
Plaintiff,	:	NO. 1:08-CV-00141
v.	:	**OPINION AND ORDER**
THE CHRIST HOSPITAL, et al.,	:	(Filed Aug. 3, 2009)
Defendants.	:	

This matter is before the Court on Defendants' Motion for Summary Judgment (doc. 28), Plaintiff's Response in Opposition (doc. 43), and Defendants' Reply (doc. 60). For the reasons indicated herein, the Court GRANTS Defendants' Motion and DISMISSES this matter from the Court's docket.

I. Background

This matter arises from Defendant The Christ Hospital's ("TCH") removal of Plaintiff Dr. Martin Jakubowski from its Family Medical Residency Program ("FMRP") in August 2007 (doc. 43). Plaintiff alleges Defendants TCH and Dr. Phillip Diller, the director of TCH's FMRP, denied him reasonable

accommodation and removed him for his disability, Asperger's Syndrome[1] (*Id.*).

Plaintiff, a 2003 graduate of the University of Medical Sciences in Poznan, Poland, started his medical career with a civilian residency in July 2005 at St. Elizabeth Hospital in Youngstown, Ohio (*Id.*). As Plaintiff explains in his briefing, he obtained the residency at St. Elizabeth through the "scramble" process, under which prospective residents who did not find a residency program through the "match" process compete for a number of left-over residency positions (*Id.*). Plaintiff struggled with clinical practice at St. Elizabeth, and the director at St. Elizabeth placed him on a remediation program in October 2005 (*Id.*). Despite the remediation program, Plaintiff continued to struggle and in June 2006, St. Elizabeth informed Plaintiff it would not renew his contract for a second year (*Id.*).

At the time, Plaintiff attributed his struggle with clinical practice to insufficient clinical training from his foreign medical school, so he decided to enroll in a

---

[1] Section 299.80 of the Diagnostic and Statistical Manual of Mental Disorders describes "the essential features of Asperger's Disorder" as "severe and sustained impairments in social interaction." The disorder causes "clinically significant impairment in social, occupational, or other important areas of functioning." Asperger's Syndrome is continuous, lifelong, "severe and defined in the same way as Autistic Disorder." American Psychiatric Association: *Diagnostic and Statistical Manual of Mental Disorders,* Fourth Edition, Text Revision. Washington, DC, American Psychiatic [sic] Association, 2000, pp. 80-84.

program of supervised clinical training at New York Medical College ("NYMC") (*Id.*). At NYMC, Plaintiff completed a series of two-to-four week rotations in various fields of medicine (*Id.*). Those evaluating his work during this time gave both positive and negative feedback (*Id.*). The written portions of the negative evaluations focused on communication problems as Plaintiff's primary deficiency (*Id.*).

Plaintiff attempted again, unsuccessfully, to match into a residency program for the 2007 residency year (*Id.*). Plaintiff contacted Defendant TCH in March 2007, through the scramble process, and after an interview with Dr. Diller, obtained a position in TCH's FMRP (*Id.*).

In July 2007, Plaintiff began an orientation for his TCH residency (*Id.*). During the orientation, Plaintiff participated in supervised patient encounters, underwent testing for medical knowledge and emotional intelligence, and attended some educational programs (*Id.*). Plaintiff's supervisors identified some weaknesses in Plaintiff's patient encounters; however, Plaintiff's overall reviews in this area suggested a satisfactory performance (*Id.*). In the medical knowledge test, Plaintiff placed in the 90th percentile among all first-year residents in the country from the previous year (*Id.*). In the emotional intelligence exam, Plaintiff performed poorly (*Id.*).

At the end of the orientation month, Dr. Diller, suspecting Plaintiff might be suffering from a cognitive disorder, referred Plaintiff to a psychologist,

Dr. Hartmann, with the request that Hartmann rule out Asperger's Syndrome (*Id.*). According to Plaintiff's briefing, his first rotation at TCH did not begin well, thanks in part to the fact Dr. Diller had sent him for a psychological evaluation (*Id.*). Moreover, in Plaintiff's view, he was left to be supervised by a doctor with little teaching experience, he was assigned with an allegedly very weak first-year resident from the Ukraine, and no one took into account Dr. Diller's suspicion that Plaintiff suffered from Asperger's Syndrome (*Id.*).

Yet another attending physician, Dr. Ellis, supervised Plaintiff during the first week of August 2007, and rated Plaintiff's performance poorly (*Id.*). At that time, Dr. Ellis suggested Plaintiff be placed on remediation immediately (*Id.*). Dr. Ellis noted that Plaintiff's medical knowledge was average to below average and commented that Plaintiff "[o]ften get[s] stuck on one diagnosis and does not explore other possibilities" (*Id.*). As for Plaintiff's communication skills, Dr. Ellis noted that "[n]urses often do not know what he is trying to relate. He had difficulty even answering a phone call and taking a message at the start of the month. He is often harsh and short on the phone to nurses as well as physician consultants" (*Id.*).

Plaintiff continued to struggle in the program, and Drs. Bernheisel and Schlaudecker documented a handful of mistakes relating to communication problems (*Id.*). Plaintiff questions the validity of the criticism, and argues that the record shows he never

harmed a patient (*Id.*). Plaintiff argues that Dr. Bernheisel could not specifically identify the most dangerous thing that Plaintiff had done, despite Bernheisel's claim that Plaintiff had been watched closely as Plaintiff could not be trusted, and Plaintiff's dangerous orders were caught before they were administered (*Id.*).

On August 24, 2007, Dr. Bernheisel told Plaintiff that Plaintiff had failed his inpatient rotation and would have to repeat it (*Id.*). The next day, Dr. Hartmann conclusively diagnosed Plaintiff with Asperger's Syndrome (*Id.*). The following Monday, August 27, 2007, Plaintiff received a letter from Dr. Diller, informing Plaintiff that he would be terminated, effective September 30, 2007 (*Id.*). That same day, Plaintiff met with Drs. Diller, Bernheisel, and Schlaudecker, at which time Plaintiff raised the issue of his recent diagnosis of Asperger's Syndrome (*Id.*).

Two weeks later, on September 11, 2007, Plaintiff, through Counsel, requested by letter the accommodation for his disability of "knowledge and understanding" (*Id.*). In Plaintiff's view, he could "be successful if all the professionals around him are made aware of his condition, its symptoms, and its triggers" (*Id.*). Shortly thereafter, Plaintiff and his Counsel met with Dr. Diller, who rejected their request for the requested accommodation, stating the program lacked the necessary resources (*Id.*). On September 13, Dr. Diller confirmed by letter that Defendants could not provide the requested accommodation, and offered to help Plaintiff find a

pathology position, if Plaintiff would forego the appeal of his dismissal (*Id.*). Plaintiff opted to appeal his dismissal, which he ultimately lost on December 18, 2007 (*Id.*).

On February 27, 2008, Plaintiff filed the instant Complaint alleging Defendants discriminated against Plaintiff in violation of the Americans with Disabilities Act, the Rehabilitation Act, and Ohio Rev. Code § 4112.02 by failing to provide a reasonable accommodation for his disability and for removing him from the program because of his disability (doc. 1).

II. The Summary Judgment Standard

Although a grant of summary judgment is not a substitute for trial, it is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56; *see also, e.g., Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962); *LaPointe v. United Autoworkers Local 600*, 8 F.3d 376, 378 (6th Cir.1993); *Osborn v. Ashland County Bd. of Alcohol, Drug Addiction and Mental Health Servs.*, 979 F.2d 1131, 1133 (6th Cir.1992) (per curiam). In reviewing the instant motion, "this Court must determine whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of

law." *Patton v. Bearden*, 8 F.3d 343, 346 (6th Cir. 1993), *quoting in part Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986) (internal quotation marks omitted).

The process of moving for and evaluating a motion for summary judgment and the respective burdens it imposes upon the movant and the non-movant are well settled. First, "a party seeking summary judgment . . . bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact[.]" *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *see also LaPointe*, 8 F.3d at 378; *Guarino v. Brookfield Township Trustees*, 980 F.2d 399, 405 (6th Cir. 1992); *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989). The movant may do so by merely identifying that the non-moving party lacks evidence to support an essential element of its case. *See Barnhart v. Pickrel, Schaeffer & Ebeling Co., L.P.A.*, 12 F.3d 1382, 1389 (6th Cir. 1993).

Faced with such a motion, the non-movant, after completion of sufficient discovery, must submit evidence in support of any material element of a claim or defense at issue in the motion on which it would bear the burden of proof at trial, even if the moving party has not submitted evidence to negate the existence of that material fact. *See Celotex*, 477 U.S. 317; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). As the "requirement [of the Rule] is that there be no

genuine issue of *material* fact," an "alleged factual dispute between the parties" as to some ancillary matter "will not defeat an otherwise properly supported motion for summary judgment." *Anderson*, 477 U.S. at 247-48 (emphasis added); *see generally Booker v. Brown & Williamson Tobacco Co., Inc.*, 879 F.2d 1304, 1310 (6th Cir. 1989). Furthermore, "[t]he mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant]." *Anderson*, 477 U.S. at 252; *see also Gregory v. Hunt*, 24 F.3d 781, 784 (6th Cir. 1994). Accordingly, the non-movant must present "significant probative evidence" demonstrating that "there is [more than] some metaphysical doubt as to the material facts" to survive summary judgment and proceed to trial on the merits. *Moore v. Philip Morris Cos., Inc.*, 8 F.3d 335, 339-40 (6th Cir. 1993); *see also Celotex*, 477 U.S. at 324; *Guarino*, 980 F.2d at 405.

Although the non-movant need not cite specific page numbers of the record in support of its claims or defenses, "the designated portions of the record must be presented with enough specificity that the district court can readily identify the facts upon which the non-moving party relies." *Guarino*, 980 F.2d at 405, *quoting Inter-Royal Corp. v. Sponseller*, 889 F.2d 108, 111 (6th Cir.1989) (internal quotation marks omitted). In contrast, mere conclusory allegations are patently insufficient to defeat a motion for summary judgment. *See McDonald v. Union Camp Corp.*, 898 F.2d 1155, 1162 (6th Cir. 1990). The Court must view all

submitted evidence, facts, and reasonable inferences in a light most favorable to the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *United States v. Diebold, Inc.*, 369 U.S. 654 (1962). Furthermore, the district court may not weigh evidence or assess the credibility of witnesses in deciding the motion. *See Adams v. Metiva*, 31 F.3d 375, 378 (6th Cir. 1994).

Ultimately, the movant bears the burden of demonstrating that no material facts are in dispute. *See Matsushita*, 475 U.S. at 587. The fact that the non-moving party fails to respond to the motion does not lessen the burden on either the moving party or the Court to demonstrate that summary judgment is appropriate. *See Guarino*, 980 F.2d at 410; *Carver v. Bunch*, 946 F.2d 451, 454-55 (6th Cir. 1991).

III. Applicable Law

Plaintiff alleges Defendants discriminated in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12112, the Rehabilitation Act, 29 U.S.C. § 794, and Ohio Revised Code § 4112.02 by failing to provide Plaintiff a reasonable accommodation for his disability and for removing him from the FMRP because of this disability (doc. 1). The Sixth Circuit has held Ohio disability discrimination claims employ the same analysis as ADA claims. *Kleiber v. Honda of Am. Mfg.*, 485 F. 3d 862, 872 (6th Cir. 2007). Similarly, the Sixth Circuit has held that although

the Rehabilitation Act and the ADA are not identical, cases construing one statute are instructive in construing the other. *Doe v. Woodford County Bd. of Educ.*, 213 F.3d 921, 925 (6th Cir. Ky 2000). As a result, the ADA analysis applies to Plaintiff's claims under the Rehabilitation Act, and Ohio Rev. Code § 4112.02.

A. The ADA Standard for Failure to Accommodate

The ADA defines discrimination as "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability." *Kleiber*, 485 F.3d 862, 868, *quoting* 42 U.S.C. § 12112(a); 42 U.S.C. 12112(b)(5)(A). The ADA further defines "reasonable accommodation" as (1) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (2) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities. *Kleiber*, 485 F.3d at 868, *quoting* 42 U.S.C. § 12111(9). In other words, an ADA plaintiff generally bears the initial burden of proving (1) he is disabled; and (2) he is otherwise qualified for the position with a plaintiff-proposed objectively reasonable accommodation. *See Id.*

ADA regulations also indicate that in order to determine the appropriate reasonable accommodation, a covered employer has the responsibility to engage in an informal, interactive process to determine whether an accommodation is possible based on the essential functions of the employee's position and employee's limitations. *Geiger v. Pfizer, Inc.*, 2008 U.S. Dist. LEXIS 89238, 13-14 (S.D. Ohio Sept. 18, 2008) citing 29 C.F.R. § 1630.2(o)(3). Furthermore, the Sixth Circuit has established that "the interactive process is mandatory, and both parties have a duty to participate in good faith." *Kleiber*, 485 F.3d at 871.

With regard to the reasonableness of a proposed accommodation, the Sixth Circuit has held that each accommodation requires a case-by-case factual analysis, and the trier of fact must find that the accommodation is objectively reasonable." *Id.* citing *Monette v. Elec. Data Sys. Corp.*, 90 F.3d 1173, 1187 (6th Cir. 1996). Once it is determined that the proposed accommodation is objectively reasonable, "the defendant employer then bears the burden of showing that the accommodation imposes an undue hardship upon it, given the employer's specific situation." *Id.*

B. The Standard for a Disability Discrimination Claim

In addition to his ADA failure to accommodate claim, Plaintiff asserts in this case a claim for discrimation [sic], premised on his removal from the residency program. Plaintiff asserts Defendants

discriminated by failing to provide him with the same opportunity for remediation as a similarly-situated resident on account of his disability (doc. 1). The Sixth Circuit addressed a situation similar to this in *Jones v. Potter,* 488 F.3d 397, 403-06 (6th Cir. Ohio 2007), where the Plaintiff alleged his termination was based on improper motives relating to his race, gender, physical disabilities, and prior litigious activity against the United States Postal Service. There, the court held that in order to make a claim for discrimination, a Plaintiff must show: (1) that he is disabled; (2) that he is otherwise qualified to perform the job requirements with or without reasonable accommodation; (3) that he suffered an adverse employment action; (4) that his employer knew or had reason to know of their disability; and (5) that, following the adverse employment action, either he was replaced by a non-disabled person or his position remained open (or in the alternative) he was treated differently than similarly-situated employees. *Id.*

IV. Discussion

A. Defendants' Motion for Summary Judgment (doc. 28)

In their motion for summary judgment, Defendants argue there is no genuine issue of material fact and thus they are entitled to judgment as a matter of law as to Plaintiff's claims (doc. 28). Specifically, Defendants assert Plaintiff failed to establish (1) he is disabled, or that (2) he is "otherwise qualified" for the

position of family practice medical resident (*Id.* citing *Kleiber v. Honda of America MGF.* [sic], 485 F.3d 862, 870 (6th Cir. 2007)).

As for their first argument, Defendants contend that because Plaintiff's Asperger's does not prevent him from working in all medical and/or science jobs, but only a limited number of specific jobs, he does not qualify as disabled, and has no ADA claim (*Id.*). In Defendants' view, Plaintiff has failed to prove he is disabled within the meaning of the ADA because he did not provide evidence he is inhibited by "a significant restriction from performing a class or a broad range of jobs in various classes" (*Id.* citing *Goldsmith v. Jackson Mem'l Hosp. Pub. Health Trust,* 33 F.Supp. 2d 1336 (S.D. Fla. 1998)).

Defendants devote the bulk of their arguments, however, to the question of whether Plaintiff is "otherwise qualified" to be a family practice medical resident. Defendants argue Plaintiff failed to prove "he can perform the essential functions of the job . . . in a way that does not endanger others" and also that Plaintiff failed to propose an objectively reasonable accommodation that makes him "otherwise qualified" (doc. 28, *citing Adams v. Rochester General Hospital,* 977 F. Supp. 226, 228 (W.D.N.Y. 1997)). Defendants contend that Plaintiff's requested accommodation of "knowledge and understanding" among the TCH staff is unreasonable and ultimately fails to address Plaintiff's communication problems and the threat to patient safety (*Id.*).

Moreover, Defendants contend no reasonable accommodation exists that would eliminate the significant risks posed to patients by Plaintiff's Asperger's Syndrome (*Id.*). Defendants argue the only way to ensure patient safety would be to assign a doctor to monitor and oversee all of Plaintiff's actions and communications (*Id.*). Defendants argue such an accommodation is overly burdensome and is not required by the ADA (*Id.* citing *Southeastern Community College v. Davis,* 442 U.S. 397 (1979)). Defendants further argue under *Kaltenberger v. Ohio College of Podiatric,* 162 F.3d 432, 436 (6th Cir. 1998), that discrimination laws do not require an educational institution to make substantial modifications to accommodate a handicapped person (*Id.*). In the light of this case law and due to what Defendants view as Plaintiff's failure to provide support for his requested accommodation, Defendants contend Plaintiff failed to prove he is "otherwise qualified" to be in the FMRP (*Id.*).

Defendants next argue their decision to terminate Plaintiff was not based on any improper animus, but rather on the nature of their program and the potential risk to patients' safety (*Id.*). Defendants contend they acted in good faith when they offered to help Plaintiff enter a pathology residency program as an alternative to the FMRP (*Id.*).

Finally, Defendants argue that Plaintiff misrepresented his experience at St. Elizabeth on his original application to their program. Under such circumstances, Defendants maintain their decision to

terminate Plaintiff's employment should be entitled to deference, and request judgment in their favor as a matter of law.

B. Plaintiff's Response in Opposition (doc. 43)

In response, Plaintiff argues he satisfied the requisite elements for an ADA discrimination claim by proving (1) he is disabled; and (2) his employer discriminated against him (doc. 43). Furthermore, Plaintiff alleges Defendants failed their duty to engage in the interactive process to develop and implement a reasonable accommodation for his participation in the residency program (*Id.*).

As for the issue of whether he qualifies as "disabled" within the meaning of the ADA, Plaintiff argues Asperger's Syndrome satisfies the definition of a disability because it substantially limits his major life activity of social interaction (*Id.*). As a result, Plaintiff contends Defendants were obligated to participate in the interactive process to identify a reasonable accommodation for his disability (*Id.*). Here, Plaintiff argues a proposed accommodation need not be acceptable or even sufficient to enable the employee to be successful, as Plaintiff maintains any requested accommodation automatically triggers the duty for both parties to engage in a good faith exploration of possible accommodations (*Id.*).

Plaintiff contends Defendants failed to act in good faith after they were put on notice of his request

for accommodation (*Id.*). Plaintiff asserts Defendants never discussed potential alternatives, accommodations, or additional resources, and also argues two other residents received more comprehensive and fair treatment in their residency programs than Plaintiff (*Id.*). Consequently, Plaintiff argues he did not have the opportunity to propose a more detailed plan and did not have a fair opportunity to seek possible accommodations such as those outlined in his experts' reports (*Id.*). Plaintiff claims these proposed accommodations, including educating the TCH staff about his condition, allowing him to seek psychological treatment to develop his social skills, providing him a mentor, and monitoring his patient encounters, could have addressed all his deficiencies and allowed him to be successful without the necessity of the monitoring by a second physician (*Id.*).

Finally, Plaintiff argues Defendants discriminated against him by failing to provide the same opportunity for remediation as a similarly-situated resident on account of his disability (*Id.*). Plaintiff alleges Defendants treated "Dr. K___," a 2005 resident with similar performance problems, more favorably (*Id.*). Plaintiff argues the only difference between him and Dr. K___ was Plaintiff's disability (*Id.*). As such, because TCH treated a similarly situated non-disabled resident more favorably, Plaintiff argues he satisfies his burden for presenting a *prima facie* case of disability discrimination (*Id.*). Plaintiff further argues any proposed non-discriminatory reasons proffered by Defendants are pretext for illegal

discrimination and contends he in no way concealed his St. Elizabeth experience from TCH (*Id.*). Given these material disputes of fact, Plaintiff submits summary judgment is inappropriate (*Id.*).

C. Defendants' Reply in Support (doc. 60)

Defendants reply by arguing Plaintiff was and remains incapable of engaging in effective communication with patients as a result of his undisputed communication barrier (doc. 60). Defendants allege Plaintiff failed to propose a reasonable accommodation in 2007, and also argue none exists today that would adequately safeguard patient safety (*Id.*).

Defendants challenge the accommodation proposals of Plaintiff's expert, Dr. Geller, asserting that all such proposals fail to account for patients' safety and fail to present any reasonable time frame (*Id.*). Defendants indicate their expert, Dr. Swikert, found Dr. Geller's report unreasonable because its proposed accommodations would significantly take away time and resources from doctors and patients, as well as take away from educational educational [sic] opportunities for other residents (*Id.*). Dr. Swikert also found Plaintiff's proposals would involve extensive patient care coverage issues and take at a minimum months to accomplish (*Id.*).

In light of these facts and the importance of patient safety, Defendants assert no reasonable accommodation exists to support Plaintiff in their program without posing a risk of compromised patient

care (*Id.*). As a result, Defendants maintain they should be provided deference in their decision to terminate Plaintiff and are entitled to summary judgment as a matter of law (*Id.*).

IV. Analysis

At issue in this case is whether a reasonable jury could find Plaintiff suffers from a disability within the meaning of the ADA. Also at issue is whether there exists any possible reasonable accommodation for Plaintiff's condition, such that he could perform the duties in the FMRP. Finally, Plaintiff questions whether Defendants' actions in response to his request for an accommodation amounted to a good faith interactive process, and whether Defendants discriminated against him by failing to provide him the same opportunity for remediation as similarly-situated residents, on account of his disability (doc. 43).

For an individual to be disabled within the meaning of the ADA, they must have: "a physical or mental impairment that substantially limits one or more major life activities." 42 U.S.C. § 12102. Although no court has directly addressed whether Asperger's Syndrome falls under this definition, one court provided a persuasive analysis in a case involving autism. There, the court held an employee could not be denied benefits for his son's autism because the disorder is recognized as a disability within the meaning of the ADA. *Morgenthal v. AT&T,* No. 97 Civ. 6443 (DAB), 1999 U.S. Dist. LEXIS 4294, *8

(S.D.N.Y. Apr. 5, 1999). To reach this conclusion, the court relied on 24 CFR 9.103, which states:

> an individual with a disability means any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. As used in this definition, the phrase:
>
> (1) "Physical or mental impairment" includes:
>
> (ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term "physical or mental impairment" includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, autism . . . mental retardation, emotional illness . . .

Id.

The Court finds no genuine dispute that the record shows Plaintiff suffers from a disability within the meaning of the ADA. The record shows Plaintiff has had serious and ongoing limitations with the major life activity of social interaction skills. Based on Dr. Hartmann's assessment and multiple supervisor evaluations, the Court finds Plaintiff's Asperger's

Syndrome amounts to a "mental impairment." 42 U.S.C. § 12102.

Having concluded that Plaintiff's condition qualifies as a disability, the Court proceeds to the question of whether there is any genuine dispute as to whether Plaintiff is otherwise qualified for the FMRP position with reasonable accommodation. The Court does not find that Plaintiff's proposed accommodation of "knowledge and understanding" on the part of Defendants' staff addresses the issue raised by Defendants about patient safety. The applicable code section, 29 C.F.R. § 1630.2(r), defines "direct threat," in this case as relating to patients, as "significant risk of substantial harm to the health or safety of the individual or others". The determination involves consideration of the duration of the risk, the nature and the severity of potential harm, the likelihood that potential harm will occur, and the imminence of the potential harm. 29 C.F.R. § 1630.2(r). The Court finds no genuine dispute that Defendants, in exercising reasonable medical judgment about Plaintiff's condition, have proffered legitimate concerns that Plaintiff's condition presents unacceptable long-term risks in the context of the medical work he seeks to perform. The very nature of the medical profession requires solid communication skills with patients; fundamental problems with such communication make likely the potential of harm to the health or safety of others.

Plaintiff also questions whether Defendants engaged in a good faith interactive process to find a

reasonable accommodation for his disability. The Court finds no dispute that Defendants offered to assist Plaintiff in obtaining a pathology position, but that Plaintiff declined such assistance and opted rather to contest his dismissal. Defendants' offer comports with their assertion that their actions were grounded in concerns for patient safety. The Court finds no genuine issue that Defendants acted in good faith.

Plaintiff argues that his expert reports show Defendants could have developed a suitable remediation program to accommodate his disability. However, the Court finds well-taken Defendants' position that Plaintiff's expert reports neither take into account a reasonable time-frame for proposed acccommodations [sic] nor address concerns about patient safety. The Court finds Defendants' expert opinion uncontested that Plaintiff's requested accommodations are unduly burdensome given Defendants' obligations to other residents, doctors, and patients. As Plaintiff has not genuinely addressed these concerns or shown evidence of bad faith on the part of Defendants, the Court finds Plaintiff not "otherwise qualified" as a matter of law and holds Defendants did not deny Plaintiff a reasonable accommodation on account of his disability.

The Court's analysis of Plaintiff's disability discrimination claim is simplified, as its finding that Plaintiff is not "otherwise qualified," with or without reasonable accommodation, results in the failure of such claim as a matter of law. Although the Court

need not reach the question, it further finds that Plaintiff's claim that similarly-situated residents received more favorable treatment falls flat, as the remediation proposed for such residents involved discrete time-frames. Defendants did not treat such residents more favorably because they lacked Plaintiff's limitations; rather Defendants offered such residents short-term remediation, a remedy that no evidence in the record shows could address Plaintiff's limitations.

Finally, although the Court agrees Defendants acted in good faith in dismissing Plaintiff, and had a legitimate basis in doing so, the Court does not find well-taken Defendants' contention that Plaintiff misrepresented his prior experience in his application for a residency. Such claim is not at all supported by the evidence, as established in Plaintiff's Response. Plaintiff concealed no evidence and acted in good faith when he applied for a residency at TCH.

V. Conclusion

Having reviewed this matter, the Court finds no genuine issue of material fact as to Plaintiff's claims such that Defendants must prevail as a matter of law. *Patton*, 8 F.3d 343, 346 (6th Cir. 1993). As sympathetic as the Court is to Plaintiff's clearly-established disability, the Court finds Defendants acted legitimately in terminating Plaintiff's employment. Plaintiff has not shown that he is "otherwise qualified" for the position he seeks by proposing a

reasonable accommodation. Nor does the Court find bad faith in Defendants' offer to assist Plaintiff to obtain a pathology position. Defendants cannot be expected to fundamentally change their program to accommodate Plaintiff with open-ended and intensive monitoring. *Kaltenberger,* 162 F.3d 432 (6th Cir. 1998). Under these circumstances, and particularly with a view toward patient safety, the Court finds Defendants' motion well-taken.

Accordingly, the Court GRANTS Defendants' Motion for Summary Judgment (doc. 28), VACATES the previously scheduled final pretrial conference and trial dates, and DISMISSES this case from the Court's docket.

SO ORDERED.

Dated: August 3, 2009 /s/ S. Arthur Spiegel
S. Arthur Spiegel
United States Senior
District Judge

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO

MARTIN JAKUBOWSKI, M.D.,

Plaintiff,

V.

THE CHRIST HOSPITAL, et al.,

Defendants.

JUDGMENT IN A CRIMINAL CASE

(Filed Aug. 3, 2009)

Case Number: 1:08-cv-00141

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☑ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

. . . the Court GRANTS Defendants' Motion for Summary Judgment (doc. 28) and DISMISSES this matter from the Court's docket.

8/3/2009
Date

JAMES BONINI, CLERK
Clerk

s/ Kevin Moser
(By) Deputy Clerk

No. 09-4097

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARTIN JAKUBOWSKI, Plaintiff-Appellant, v. THE CHRIST HOSPITAL, INC., ET AL., Defendants-Appellees.	)	ORDER (Filed Jan. 24, 2011)

BEFORE: MARTIN, COLE, and CLAY, Circuit Judges.

The court having received a petition for rehearing en banc, which was circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk